

# Ofcom Broadcast Bulletin

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## Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes which broadcasting licensees are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code") which took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>
- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at [http://www.ofcom.org.uk/tv/ifi/codes/code\\_adv/tacode.pdf](http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf).
- c) other codes and requirements that may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at <http://www.ofcom.org.uk/tv/ifi/codes/>

From time to time adjudications relating to advertising content may appear in the Bulletin in relation to areas of advertising regulation which remain with Ofcom (including the application of statutory sanctions by Ofcom).

It is Ofcom policy to state the full language used on air by broadcasters who are the subject of a complaint where it is relevant to the case. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

## Standards cases

### In Breach

#### Jon Gaunt

*Talksport, 7 November 2008, 11:25*

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#### Introduction

Jon Gaunt was a presenter on this speech-based station. In his programme, the presenter covered a range of issues from the news and was well known for his combative and hard-hitting style with participants.

Ofcom received 53 complaints about an interview by Jon Gaunt conducted with a local councillor, Michael Stark. The interview concerned the policy of the London Borough of Redbridge that from 2010 any foster carers in the borough would be required to be non-smokers.

Complainants said they were offended by the interview and said it was “unacceptable”. They objected to the way in which Jon Gaunt interviewed the councillor as they believed Mr Stark had been treated in an offensive and insulting manner culminating in him being called a “Nazi” by Jon Gaunt and an “ignorant pig”. Complainants stated that this was an “unprovoked personal attack” on the councillor and the interview was variously described as “oppressive”, “intimidating” and that the interviewer was “shouting like a playground bully”.

A number of the complainants also suggested that the manner in which the term “Nazi” had been used, belittled the sacrifice that was made in World War II. (The interview was conducted just before Remembrance Sunday). Some complainants also stated they found the manner in which the word “Nazi” was used to be offensive as they were Jewish.

The interview itself was extremely heated and during the interview, Jon Gaunt and Michael Stark had a number of exchanges, such as:

Presenter: “*...What about an existing foster parent who doesn't give up smoking and says actually, well, I like having a fag but I'm not going to smoke in front of the children, I never smoke inside the room, I only ever go out on the front door, why can't they foster?*”

Mr Stark: “*Well, we're not going to drag children away from foster parents they are already with*”.

Presenter: “*No, I'm talking post 2010, when your policy comes into place*”.

Mr Stark: “*In the future, we will not be using them as foster parents*”.

Presenter: “*Okay, so now we're getting to it. So, therefore, somebody who says: yes, I like a fag, I smoke 10, 20 a day, but I've never smoked in the house, I smoke outside; that person would not be allowed to be a foster parent?*”

Mr Stark: “*No, because the trouble is Jon they do smoke in the house*”.

Presenter: “*How do you know that?*”

- Mr Stark: “Cause we have councillors on our council who are smokers and they say we never smoke in the building, there’s a policy - we wouldn’t dream - you go in their offices, there they are, puffing away illegally as they drop it on the floor”.
- Presenter: “So you are a Nazi then?”
- Mr Stark: “Erm, I find that...”
- Presenter: “So, you are, because - you are, you’re a Nazi...”
- Mr Stark: “No, no, no, no, no, no, no, no...”
- Presenter: “Because what you’re saying, what you’re saying....”.
- Mr Stark: “I’m not going to let you just say that, or whatever you’re going to say next. That is an offensive, insulting remark that is emotive and brings discussion down to the lowest key...”

Ofcom further noted that after several minutes of tense exchanges and various comments by the presenter, Jon Gaunt said the following:

- Presenter: “You’re now going to insult me, are you, and say that somehow because I was in care and because of the experiences I’ve got I am some kind of victim and I have some kind of psychological problem? I find that immensely offensive, not only to me but to everybody else who has been through the care system, you ignorant pig”.

Later in the programme, the heated discussion continued:

- Mr Stark: “you are...rude...no because you have used an insult that is probably actionable in law to be quite honest...”
- Presenter: “well I think your attitude is wrong...”
- Mr Stark: “probably actionable...probably actionable...”
- Presenter: “take action ...take action...because listen to me..”
- Mr Stark: “no doubt that will give you more publicity and make you more thrilled”
- Presenter: “take action if you wish”
- Mr Stark: “make you more thrilled”
- Presenter: “you are a health Nazi...you have no evidence”
- Mr Stark: “oh, you’ve put another word in front now, to carry out the legal part... health Nazi, that’s alright, you’ll probably get away with that one”

As the interview progressed, the presenter referred to the interviewee as a “health Nazi” and a “Nazi” as well as “an ignorant pig”.

Ofcom asked Talksport for its comments under Rule 2.1 which states that generally accepted standards must be applied to television and radio services and Rule 2.3 which says that material that may cause offence must be justified by the context.

## Response

Talksport told Ofcom that it regretted what had happened, stating: “The interview fell way below the acceptable broadcasting standards that Talksport expects and demands as a radio station”. The station also said that it: “totally accepts and regrets that the language [used by Jon Gaunt] was offensive and that the manner in which the interview was conducted was indefensible”.

Talksport said that Jon Gaunt: “was known to be an outspoken, hard-hitting, opinionated and aggressive presenter”. The station had encouraged him to be himself, but also made it clear to him the requirement to always remain within the law and abide by the Code.

In this case, the programme’s assistant producer had suggested that the programme should cover the London Borough of Redbridge’s policy on foster parents. Jon Gaunt expressed his enthusiasm for this idea and the interview with Michael Stark was organised. Talksport said that, prior to the programme, Jon Gaunt had been warned by the programme producer and assistant producer that the interview with Michael Stark might be emotive for him, given his own experience of being in care as a child. In the few hours prior to the interview, the licensee stated that Jon Gaunt was warned on 3 occasions by programming staff to remain calm and allow Michael Stark to put his point of view across.

During the interview itself, Talksport said that Jon Gaunt ignored “constant instructions by talkback and hand signals” from the producer to calm down, let the guest answer the questions, and retract the use of the word “Nazi”. According to Talksport, the programme producer had considered using the so called “dump” button<sup>1</sup> but decided it was better to get Jon Gaunt to retract and qualify his comments. This Jon Gaunt did by calling Michael Stark “*a health Nazi*”. As the programme producer believed Jon Gaunt was ignoring his comments, he gave further instructions by talkback and hand signals to conclude the interview. Eventually, Jon Gaunt terminated the interview. At the behest of the programme producer, Jon Gaunt gave two on-air apologies within the programme, following the interview.

The broadcaster said that it was proud of its reputation for using outspoken presenters to voice their opinions and tackle a range of issues that engender debate with listeners and guests. Whilst recognising that such debate could become heated, the station recognised that, aside from its legal and regulatory obligations, Talksport had two self-imposed boundaries. First: not to let robust debate “descend into an unedifying war of words that includes personal insults, offensive language and bullying”. Second: “to give both callers and guests a fair crack at expressing their views without being subject to ridicule or abuse”. The station considered that in this case, both boundaries had been crossed and the interview had been “without precedent” on the station.

In summary, Talksport said it took the following steps, after the interview:

- after the programme, the programme producer spoke to Talksport’s Programme Director, as the programme producer: “was deeply concerned about how the interview was conducted”. After receiving a written report on the matter and listening to a recording of the interview and the two on-air apologies given by Jon Gaunt, the Programme Director spoke to Jon Gaunt a few hours after the programme. In this

<sup>1</sup> Talksport operates a 7 second delay mechanism on all its broadcasts. The “dump” button allows the producer to go to “live” broadcasting and so drop the previous seven seconds of the broadcast. The programme producer was concerned in this case that using the “dump” button would have meant the broadcast going totally live and would have meant the station being, according to Talksport: “exposed to a comment by either the presenter or the guest that may not [have been] so easily qualified”.

conversation, the Programme Director told Jon Gaunt he thought that the interview had been “appalling”. Jon Gaunt had defended himself by saying that Michael Stark had provoked him, and that it was a very emotive subject for Jon Gaunt personally, as he had been in care himself as a teenager;

- following discussions within senior management at Talksport, and UTV, who owns the station, it was decided that Jon Gaunt would be suspended and an internal investigation launched. The Programme Director informed Jon Gaunt of his suspension by telephone on the evening of 7 November 2008 (i.e. the same day as the broadcast);
- on the day following the broadcast, the Radio Managing Director of UTV apologised to Michael Stark for the manner in which the interview had been conducted, and for the use of the words “*Nazi*” and “*ignorant pig*”;
- in the days following the broadcast, the station’s internal investigation held interviews with a range of Talksport personnel, including Jon Gaunt. On 17 November 2008, after taking into consideration all relevant facts, including the results of the internal investigation, the decision was taken to terminate Jon Gaunt’s contract; and
- on 21 November 2008, the station broadcast an on-air apology.

In summary, Talksport contended that it had taken swift and decisive action that had resolved the matter<sup>2</sup>.

## Decision

The freedom of broadcasters to choose what topics to cover in the programmes they broadcast and in what manner, is fundamental to today’s broadcasting culture and a principle enshrined in the regulatory framework in which Ofcom operates. All broadcasters have the right to hold opinions and impart information and ideas to their audiences without interference and audiences are entitled to receive those ideas and opinions. Whilst broadcasters are obliged under their licences to comply with the standards set out in the Code, including standards which adequately protect members of the public from offensive (or harmful) material (Rule 2.3), these standards should be applied in a manner which “best guarantees an appropriate level of freedom of expression”<sup>3</sup>. In this case, Ofcom recognises that Talksport specialises in a genre of hard-hitting talk radio, which encourages robust interaction between its presenters (such as Jon Gaunt) on the one hand, and audience

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<sup>2</sup> Following the original publication of this Finding on 11 May 2009, Ofcom received representations from Jon Gaunt disputing matters stated by Talksport in relation to him as set out in this section. In particular, he disputed that the requirement to remain within the Code was ever made clear to him by Talksport, stating that he had received no training in this respect. He denied that he had been warned by the programme producer and assistant producer that the interview with Michael Stark might be emotive for him, given his own experience of being in care as a child. He also disputed that he had received any instructions from Talksport production staff to “calm down” during the interview; or retract his use of the word “*Nazi*”; or telling him to conclude the interview. Jon Gaunt maintained that he decided to apologise on air of his own volition, without any advice, instruction or prompting from Talksport production staff; and that he himself decided to conclude the interview. Ofcom put the substance of Jon Gaunt’s representations to Talksport, who in turn disputed Jon Gaunt’s account of events. Ofcom therefore notes that there are areas of dispute between Talksport and Jon Gaunt as regards the surrounding circumstances of the 7 November 2008 broadcast and the steps taken by Talksport in relation to it. See Ofcom’s Supplementary Note published in Broadcast Bulletin 135 on 8 June 2009.

<sup>3</sup> Section 3(4)(g) Communications Act 2003

members and invited guests on the other. It is not surprising that at times this interaction may prove uncomfortable and challenging listening.

The fact therefore that material may be offensive to some is not, in itself, a breach of Ofcom's Code because the Code does not prohibit the broadcasting of offensive material - to do so would be considered an inappropriate restriction on a broadcaster's and the audience's freedom of expression<sup>4</sup>. What the Code requires is that generally accepted standards are applied to broadcast content (Rule 2.1) and that the inclusion of offensive material in a programme must be justified by the context (Rule 2.3). In this case, a well-known talk radio presenter, with a distinctively robust style, conducted an interview with a local councillor, who had been invited onto the programme to explain his council's new policy on foster carers. Ofcom noted that from the outset, not uncharacteristically Jon Gaunt took an aggressive and hectoring tone with Michael Stark. As indicated above, such an approach may well not have been at odds with audience expectation for this programme or station. However, this tone sharpened as the interview progressed. Jon Gaunt gave little chance for his guest to answer his questions, and dismissed those answers he did give. Ofcom noted that this culminated with Jon Gaunt calling Michael Stark, at times, a "Nazi" and an "*ignorant pig*". The overall tone of Jon Gaunt's interviewing style on this occasion was extremely aggressive and was described by complainants as "oppressive", "intimidating" and felt the interviewer was "shouting like a playground bully".

Ofcom recognises that the subject matter in this case may have been a particularly sensitive one for the presenter, given his own experience of being in care as a child. Further, Ofcom noted that Jon Gaunt later qualified his use of the word "Nazi" to some extent by subsequently referring to Michael Stark as a "*health Nazi*". However, following that qualification, he reverted back to the original term "Nazi". The presenter also referred to the interviewee as "*an ignorant pig*" and told him to "*shut up*".

Ofcom noted the steps that Talksport said it had taken before the programme to warn the presenter to exercise care during the interview, and the purported attempts by programming staff to control the situation during the interview. Further, Ofcom recognises the seriousness which the broadcaster attached to the incident, as shown by its prompt investigation into it and the two on-air apologies by Jon Gaunt:

The first apology was at 11:37:

Presenter: "*Well, I didn't hold it together. So I'd like to apologise to the listeners. I'm not going to apologise to him. He's exactly the kind of bloke who was in charge of social services when I was in care, so I'm not going to apologise to him. But I will apologise to you. I was unprofessional. I lost the rag. It's something very close to my heart, which I'm sure you know about, but I did lose my rag with him. I wish I hadn't lost my rag with him. And for those who are still laughing at me – fair enough, keep laughing*".

The second apology was at 12:32:

Presenter: "*The councillor wants me to apologise for calling him a Nazi. I'm sorry for calling you a Nazi*".

However, Ofcom remains concerned, in the wake of the recent sanction imposed by it on Talksport involving *The James Whale Show*<sup>5</sup> that the broadcaster's compliance procedures do not appear robust enough to deal with problematic material being broadcast live. It is

<sup>4</sup> As enshrined in Article 10 of the European Convention on Human Rights.

<sup>5</sup> [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/Talksport.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/Talksport.pdf)

essential that whenever a broadcaster is making a live broadcast, the licensee maintains full responsibility for – and so should retain control over – all output. It is especially crucial that broadcasters ensure that presenters, however experienced, receive and obey clear instructions of production staff during live broadcasts and that generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion of material which is offensive and/or harmful.

Rule 2.3 of the Code states that offensive material: “may include...offensive language...humiliation, distress [and] violation of human dignity”. Ofcom considered the language used by Jon Gaunt, and the manner in which he treated Michael Stark, had the potential to cause offence to many listeners by virtue of the language used and the manner in which Jon Gaunt treated his interviewee. In this case, the offensive language used to describe Mr Stark, and what would be considered to be a persistently bullying and hectoring approach taken by Jon Gaunt towards his guest, exceeded the expectations of the audience of this programme, despite listeners being accustomed to a robust level of debate from this particular presenter. Even taking into account the context of this programme such as the nature of the service, the audience expectations and the editorial content, Ofcom did not consider that this was sufficient justification for the offensive material. The broadcaster therefore failed to comply with generally accepted standards in breach of Rules 2.1 and 2.3 of the Code.

### **Breach of Rules 2.1 and 2.3**

## In Breach

### Ramsay's Great British Nightmare

Channel 4, 30 January 2009, 21:00 - 23:00

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#### Introduction

*Ramsay's Great British Nightmare* was commissioned by Channel 4 as part of its *Great British Food Fight* season and based on the long-running *Ramsay's Kitchen Nightmare* series transmitted by Channel 4 since 2004. The series follows the chef, Gordon Ramsay, as he takes on failing restaurants and attempts to turn them around. He tackles amongst other things, poor management, inferior cooking and unacceptable levels of hygiene.

Ofcom received 51 complaints from viewers about the programme broadcast on 30 January 2009 from 21:00. They objected to the frequency and sustained nature of the use of the most offensive language (i.e. "fuck", "fucking" and "fucked"). Complaints included:

"The excessive use of bad language by Gordon Ramsay was just unreal and the abusive way in which he continually used it to speak to others, the use of the 'F' word once or twice maybe but it's continued used in almost every sentence was totally unnecessary. I know it was after 9.00 but there are limits...";

"I am a great fan of Gordon Ramsay but there was far too much swearing in this program. It was embarrassing and rude, and I had to turn it off";

"I can handle the odd swear word from Gordon but is it really necessary to have this in every other word from all involved. The shows over use of the word FUCK is unreal"; and

"For the first time...ever I find myself totally shocked and actually unable to watch a show due to the use of the words "Fuck" "fucking" and "shit". There seems to be a swear word almost every other word. I am 45 mins into the show and I am afraid I have had enough".

Ofcom noted that the first two parts of the programme, broadcast between 21:00 and 21:40, contained 115 instances of the most offensive language.

Ofcom asked Channel 4 to comment on the acceptability of this language in the programme with respect to Rule 2.3 of the Code (offensive content must be justified by context).

#### Response

Channel 4 said that Gordon Ramsay's exposés of restaurants provide a compelling insight for viewers who would not otherwise have the opportunity to see what goes on behind the scenes. The broadcaster stated that by exposing the truth and delivering frank advice which has been gained from 20 years in the hospitality industry, he upholds the interests of restaurant goers throughout the UK.

The broadcaster continued that with only five days to turn businesses around, Gordon Ramsay has no time for niceties or gently persuading people to change their ways, and that his management skills are based in the first instance on confrontation – confronting owners with unavoidable truths which they must act upon. It said that he provides professional advice and "inspirational guidance" in a frank and tough talking manner commonly used in restaurant kitchens. His assessments are precise and, given the failings he witnesses, often

severe. Importantly however, Channel 4 said that any conflicts which arise from his confrontational manner are invariably followed by resolution, and that the consistently high audiences for the series since its inception in 2004 mean that Gordon Ramsay's repeated use of strong language is within the expectations of the audience.

Channel 4 stated that in this programme Gordon Ramsay was assessing two failing restaurants. He assessed each restaurant's décor, menu, food quality and preparation, financial status and personnel. Channel 4 said that the level of strong language in the first two parts of the programme was partly due to the honest and genuine reactions Gordon Ramsay experienced in relation to the two failing restaurants and to emotional exchanges between the contributors themselves. Channel 4 noted that Part Two of the programme included the highest levels of strong language. It said this was due to the chef assessing the more intricate details of each establishment and tensions arising as Gordon Ramsay delivered his hard-hitting advice, which led to an explosive confrontation between one restaurant owner and his chef.

Channel 4 continued that whilst the level of strong language included in the programme was at the higher end of the scale it was not inconsistent with the acrimonious disputes and levels of strong language that has regularly featured across the *Kitchen Nightmares* series. Indeed, it argued, that such a high volume of strong language (including from the start of the programme) is not exceptional and would not have been beyond the expectation of a returning audience. Channel 4 continued that regular viewers to the programme would expect that Gordon Ramsay and the contributors would use strong language in the first segments of the programme where the chef would deliver his hard-hitting advice and tensions would tend to run much higher. In addition, it said that viewers want to see this conflict, drama and strong language before a final resolution is achieved in the concluding part of the programme.

The broadcaster also highlighted in its response that each episode of *Kitchen Nightmares* was preceded by a clear warning. This informed viewers that the programme includes "*strong language from the start and throughout*". It said that this warning provides adult viewers with sufficient information to inform their viewing choice and to decide whether to permit any children to watch.

Channel 4 stated that the programme had unique characteristics which justified the high level of strong language that was included. It was a two-hour special which included: two distinct storylines; two stubborn contributors who seemed incapable of receiving advice from anyone; and two highly tumultuous personal relationships. The inter-cutting of these storylines and a highly emotive contribution from one of the restaurant's chef, in Part Two, significantly exacerbated the tensions illustrated in the programme. Channel 4 said that the use of strong language in this programme accorded with the likely expectations of the audience, was editorially justified, and did not offend the overwhelming majority of viewers. It therefore considered that the programme complied with Rule 2.3 of the Code.

In conclusion, Channel 4 acknowledged that strong language is certainly not to everyone's taste but it felt the relevant Rules set out in the Code are sufficient and proportionate to promote freedom of expression whilst balancing broadcasters' need to act responsibly and ensure that any potential offence caused by a programme is justified by its context. It said that it would however be concerned if the Rules were interpreted and applied in a manner which resulted in a disproportionate impingement on Gordon Ramsay's or indeed other contributors' freedom to express themselves freely and Channel 4's viewers' right to receive and watch his programming in this format.

## **Decision**

When dealing with programmes that may contain offensive material, such as *Ramsay's Great British Nightmare*, Ofcom should exercise its duties in a way which is compatible with Article 10 of the European Convention of Human Rights. In ensuring that broadcasters apply generally accepted standards, Ofcom must do so in "the manner that best guarantees an appropriate level of freedom of expression" (Section 4(g) of the Communications Act 2003). Freedom of expression encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. Applied to broadcasting, Article 10 therefore protects the broadcaster's right to transmit material as well as the audience's right to receive it, as long as the broadcaster ensures compliance with the Rules of the Code as well as the law. Ofcom therefore does not prohibit offensive material. However, in line with the Code, such material must be justified by the context.

Given the application of Article 10 broadcasters are free to explore a wide range of challenging and provocative subjects in programmes. In addition, in relation to Channel 4, Ofcom notes that it has a distinctive remit to provide: "a broad range of high quality and diverse programming which...appeals to the tastes and interests of a culturally diverse society".

Rule 2.3 states: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context..." The Code explains that "context", includes such factors as the editorial content of the programme, programmes or series, the service on which the material is broadcast, the time of broadcast, the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes, the likely size and composition of the potential audience and its likely expectations, and the extent to which the nature of the content can be drawn to the attention of the potential audience.

In the case of programmes featuring Gordon Ramsay, this context is important given his well-known reputation for using offensive language. Ofcom also ensures that it assesses each programme complained of on a case by case basis, taking all the relevant factors into account. In assessing the wider context of this programme, Ofcom noted that:

- the channel provided pre-transmission information about the level of language in the programme: "*strong language from the start and throughout*";
- this was a two hour programme compared to the usual one hour;
- the contributors as well as Gordon Ramsay used the most offensive language; and
- offensive language was often used at times of emotion and stress which typifies the series as a whole.
- The likely audience expectation for this programme

As noted above, Ofcom recognised that *Ramsay's Great British Nightmare* differed slightly from the usual *Kitchen Nightmares* strand in as much as it was a two hour special featuring not one but two failing restaurants. The result was that parts one and two of the programme where Gordon Ramsay traditionally gives his unvarnished opinion - and which often results in confrontation - was twice as long. As a consequence this amplified significantly the effect of the language on the viewer.

Given the programme's well-established reputation for using the most offensive language, Ofcom accepts that the vast majority of the audience comes to the programme with certain expectations. However, on this occasion there were 115 examples of the most offensive language i.e. "fuck" and its derivatives, in the first 40 minutes of the programme. In the first 15 minutes there were a total of 37 examples. The second part of the programme, between 21:20 and 21:40, contained a further 78 examples. Ofcom also noted that much of the offensive language was delivered in an extremely intense and at times aggressive manner.

The most aggressive scene, which Channel 4 admits contributed to the overall tally of strong language in the programme, occurred in part two of the programme where, at approximately 21:30, a restaurant chef angrily berated his boss shouting the word “*fucking*” at him 30 times in less than two minutes.

The range of complaints made to Ofcom indicated that a number of regular viewers to the programme were shocked and offended by the combination of the sheer frequency of the offensive language and the way some of it was delivered. Whilst acknowledging that they were fans of the show many of them simply found it unacceptable and were extremely discomfited by it. In Ofcom’s opinion therefore, despite its established expectation regarding the strength and frequency of language, the audience would not have expected such sustained and very frequent use of the most offensive language as featured in this particular edition of the programme, particularly in the first 40 minutes which followed the 21:00 watershed.

The broadcaster and the audience has a right to freedom of expression. Importantly, the programme purports to show real life situations and record them as they unfold. (However, we note that in the acquired American version of this programme *Ramsay’s Kitchen Nightmares USA*, the level of strong language is considerably less, but in very similar intense circumstances). As Channel 4 points out the audience expects to see the drama and conflict played out before some form of resolution is reached. Therefore, to limit completely the transmission of a programme such as this would be a disproportionate restriction and could result in a chilling effect on broadcasters’ output. Nevertheless, freedom of expression may be limited and should at all times be balanced by the requirement on the part of the broadcaster to apply generally accepted standards to ensure adequate protection for members of the public from offensive material. In Ofcom’s view, by broadcasting this particular programme *at this time* after the watershed, Channel 4 did not apply generally accepted standards. This is due to the unexpected and sheer intensity and level of swearing in the first two parts of the programme. The strong language had not been used as a comedic device or as part of a characterisation but was at times extremely aggressive and, as described by complainants, “gratuitous” and “unreal”. Ofcom therefore concluded that it was not warranted since there was not sufficient editorial justification or context in this programme for the level and intensity of swearing in the first two parts of the programme, transmitted between 21:00 and 21:40.

The audience has a good understanding that as the evening progresses the context changes and material is likely to become more challenging and may contain frequent and strong language. However, where viewers have established expectations for a particular programme, at a particular time, broadcasters should carefully consider the impact of any significant editorial changes which may subsequently challenge those expectations. It was clear to Ofcom that the frequency and nature of the most offensive language in the earlier parts of this programme and at the time it was broadcast deviated seriously and significantly from previous editions, because this was the first time Channel 4 had broadcast a two hour edition of *Ramsay’s Great British Nightmare*, starting at 21:00. As a direct consequence the scale, frequency and way in which the most offensive language was delivered in the first two parts of this programme, went significantly beyond what could be *reasonably anticipated* by regular viewers - at this time of the evening – and resulted in a breach of the Code.

### **Breach of Rule 2.3**

## In Breach

### Kinky and Proud

*Virgin 1, 28 December 2008, 21:00*

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#### Introduction

Ofcom received two complaints about *Kinky and Proud*. This programme was one in a series of factual programmes which - as described by the broadcaster - documented "alternative human behaviours". This episode explored more unusual sexual preferences such as latex fetishes, spanking and cross dressing, and "*pony play*" (in which a man "*trained*" a topless woman in harness who was pretending to be a horse). The programme contained interviews with the individuals who engaged in these activities and these were accompanied by light hearted commentary and contributions from stand up comedians, a journalist, an 'agony uncle' and a psychotherapist. The complainants expressed concern that the sexual images and language in this episode were offensive and not suitable for broadcast so soon after the watershed at 21:00, on a general entertainment channel that was available unencrypted.

Before the programme started the broadcaster warned viewers that the programme included "*strong language, nudity and a whole lot of weird stuff*" and the programme highlighted the material that was coming up after each of the advertising breaks.

Ofcom asked Virgin Media (which complies Virgin 1) for comments under Rule 2.3 which states that "broadcasters must ensure that material which may cause offence is justified by the context".

#### Response

In summary, the broadcaster argued that the programme did not breach Rule 2.3 because the content of the programme was justified by the context.

The broadcaster stated that *Kinky and Proud* had a "good humoured and affable approach to documenting a wide range of alternative human behaviours". It acknowledged that the episode contained mild references to, and conversations about, sexual activity but it did not include anything explicit. A clear warning about the content around 21:00 before the start of the programme provided a sufficient lead into the watershed period, and the information highlighting what was coming up before each part of the programme would have assisted viewers in knowing what to expect.

In addition, the broadcaster considered that the stronger items in the programme such as the woman with a strap-on dildo fetish, and the female dominatrix and her male maid, were "devoid of any explicit sexual imagery". Whilst there was some overt sexual language and images of sex toys, it did not believe the content exceeded the material that was widely available on other channels after the watershed. Indeed the editorial content was not intended to shock viewers but to highlight the very human and tragic stories behind certain sexual practices.

Virgin 1 also argued that, given the channel specifically appeals to a male adult audience, the likely child audience for this programme would have been typically low. The broadcaster explained that the programme had been broadcast four times previously and had not received any complaints and this "demonstrated that the content was not contrary to generally accepted standards nor likely to cause offence". However, in light of the complaints

received, Virgin 1 stated it had removed the programme from a 21:00 slot until Ofcom had made a decision.

## Decision

Broadcasters can show programmes with adult themes provided they comply with the Code. In this case the applicable Rule 2.3 makes clear that "in applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context." "Context" includes a variety of factors such as the time of broadcast, the editorial content of the programme, the service on which it is broadcast, and the effect of the material on viewers who may come across it unawares. In applying the Code, Ofcom must take account of Article 10 of the European Convention on Human Rights which provides a right of freedom of expression to both broadcasters and viewers.

In terms of the editorial content, Ofcom noted that the programme followed a popular format of a chart countdown with some of the more 'bizarre' fetishes, such as those involving hair and power tools, referenced very briefly. However, the main focus of this programme was to explore, through a series of interviews and clips, a range of better known sexual fetishes such as spanking, bondage, strap-on dildos, domination and submission. The content included a number of images which showed a range of fetish practices in some detail. These included a person being tied up and whipped in a dungeon-like room, a semi-naked woman wearing a variety of strap-on dildos, a woman with a bare bottom lying across a man's knees being spanked, and a man and woman engaging in "*pony play*". There were also frank discussions about these practices. In Ofcom's view such images and discussions, particularly given the time of broadcast starting at 21:00, had the potential to cause offence to viewers.

In assessing the context, Ofcom acknowledged that the programme had previously been shown at 21:00 without complaint and was broadcast with pre-transmission guidance that provided some information to viewers about the programme's content. The programme also included comment from a psychotherapist and 'agony uncle', who provided context by explaining some of the fetishes, and comedians who reacted with laughter and cynicism in response to some of the unusual practices described.

However, Ofcom noted that the programme started immediately at the 21:00 watershed, on a general entertainment channel which is available unencrypted to all viewers, including children. As described above, the editorial content contained images and discussions about unusual fetish practices. Although the title of the broadcast and pre-transmission information provided an expectation that viewers would see quite challenging material, in Ofcom's opinion, this likely expectation would not have extended to the stronger content actually included in this broadcast. Irrespective of complaints, broadcasters are under a duty to ensure compliance with the Code, which includes applying generally accepted standards so as to provide adequate protection for members of the public from offensive material. The 21:00 watershed lays down a boundary for when broadcasters may start *progressively* to air material more suitable for a predominantly adult audience. It does not mark a moment when they may immediately start to transmit content which is at odds with overall audience expectations for material broadcast on that channel at that time.

For these reasons, Ofcom concluded that the offensive material included in this programme was not justified by the context. In Ofcom's view, whilst the overall tone of the programme was light-hearted, portrayal of these more unusual fetish preferences required the broadcaster to provide greater justification in terms of context - and in particular a later time of broadcast - to ensure adequate protection to viewers from offensive material. Therefore the broadcaster did not apply generally accepted standards in this case and Rule 2.3 was breached.

**Breach of Rule 2.3**

## In Breach

### Emmerdale

ITV1, 16 December 2008, 19:00

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#### Introduction

*Emmerdale* is a weekly peak-time drama serial generically referred to as a ‘soap’. The King family, including brothers Jimmy, Mathew and Carl, arrived in Emmerdale in 2004. Since arriving they have been portrayed as ruthless and successful businessmen involved in numerous scandals in the village. In this one-hour special Mathew King was to marry local business woman, Anna. However his brother Carl had other ideas, informing the bride that Mathew had been responsible for her father’s recent death (which was partly true). Anna cancelled the wedding and a fist fight developed between Mathew and Carl as a number of wedding guests and their brother Jimmy tried to intervene.

17 viewers complained to Ofcom that the fight that developed between the King brothers was too graphic and violent for the time of transmission in the early evening at 19:00. Ofcom asked the broadcaster to comment with regard to Rule 1.11 which states that “Violence, its after effects and descriptions of violence...must be appropriately limited in programmes broadcast before the watershed...”

#### Response

ITV1 said that this episode was very carefully considered in relation to Rules 1.11 and 2.3 (generally accepted standards). It said that like other TV ‘soaps’ *Emmerdale* regularly includes family conflicts. It continued that the scenes in question were a dramatic and emotionally charged climax to a long-running storyline of deceit and betrayal between family members and, given the nature of the established characters, regular viewers would have expected a confrontation between them to be explosive and potentially physical.

The broadcaster said that it was not its intention to cause viewers concern or distress, and it was aware that emotional and confrontational scenes are not to the taste of all its viewers. As a result it preceded the programme with information that the episode included a “*violent encounter for the King brothers*”. It also edited the scenes in an attempt to moderate the explicit violence of the confrontation to a level that it judged would be acceptable for the editorial context in which it was portrayed and that the scene in question consisted primarily of pushing, shoving and raised voices interspersed by dialogue. It said that it was filmed carefully to minimise detailed shots of violent blows seen by the viewer and, whilst a lampstand was picked up and used in a threatening manner, care was taken to ensure that the subsequent blow from the lamp-stand was not explicitly shown.

ITV1 continued that in considering the script and during editing of the sequence in question it took into account previous adjudications by Ofcom in relation to violence in ‘soap’ dramas, for example in Bulletin 103<sup>1</sup>. It concluded that the degree of threat and of actual violence was appropriately limited and, whilst it regretted that some viewers were concerned by the scenes, it considered most viewers’ expectations of programming of this nature, for this time in the evening, were met.

#### Decision

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<sup>1</sup> [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb103/bb103.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb103/bb103.pdf)

Ofcom noted that the fight between Carl and Mathew King was sustained and at times vicious. Where ITV1 had described the action as “potentially physical”, the programme did in fact feature blows and kicks (delivered and sustained by both men to the body and head) and the use of a large metal lamp-stand as a weapon (which was pushed into Mathew’s face with corresponding sound effect). The level of violence was further heightened by blood flowing from wounds, the smashing of household objects and a number of people shouting and screaming. This tense and violent scene lasted for 2 minutes. The next and final part of the programme featured a sequence showing a bloodied Mathew King behind the wheel of a van, crashing into a wall at speed. He flew through the windscreen landing with a loud thud on the floor. He died in close-up with his face covered in blood.

*Emmerdale* starts at 19:00, some two hours before the 21:00 watershed. It is firmly positioned and established in peak family viewing time as a ‘soap’. It is therefore always likely that some children will be in the audience watching with adults in the home. Audience figures for this episode indicate that 482,000 children between the ages of 4 and 15, representing an 18.8% share of all children viewing the television at the time, were watching the programme. This figure is not insignificant and brings with it a responsibility on the part of the broadcaster to ensure that any violence it portrays as part of the storyline is appropriately limited for the time of transmission. The broadcaster must therefore strike a balance between providing quality and engaging drama in a peak-time slot and complying with the requirements of the Code as regards protecting members of the public in general and in particular children.

Ofcom noted the broadcaster regretted that some of its viewers were concerned by the scenes of violence in this episode although it considered that overall audience expectations were met. In addition, Ofcom noted that the broadcaster referred to Broadcast Bulletin 103 to which it looked for guidance regarding this particular episode (see footnote 1 above). However, Ofcom considered that the In Breach Finding published against ITV1 (for another episode of *Emmerdale*) in Broadcast Bulletin 83<sup>2</sup> and a corresponding Note to Broadcasters in the same publication was more pertinent in this case. In the Note to Broadcasters Ofcom stated that *“Ofcom has considered that a number of cases it has dealt with recently have contained violence that goes to the limits of what is acceptable in terms of the Broadcasting Code. Therefore, it would like to remind broadcasters to take particular notice of Rule 1.11 of the Code...when portraying violence in pre-watershed programmes”*.

In Ofcom’s view this programme contained an unacceptable level of violence for broadcast in a programme which began at 19:00 when children were likely to be watching, and indeed were viewing, in considerable numbers. Ofcom therefore judged that the fight scene between Mathew and Karl King was in breach of Rule 1.11 of the Code.

### **Breach of Rule 1.11**

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<sup>2</sup> [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb83/issue83.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb83/issue83.pdf)

## In Breach

### Stylista trailer

Five, 22 February – 4 March 2009, various times

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#### Introduction

*Stylista* is an American reality programme in which participants compete for a job at a leading fashion magazine.

Promotions for the programme were broadcast between 16:00 and 19:00 and included: the sentence “*Bitchy is the new black*” on screen; and, a clip of one contestant saying about another, “*she’s such a f---ing bitch*” (with the expletive partially bleeped).

Six viewers complained that these trailers were broadcast during programmes that appealed to younger viewers and their children were watching. These programmes included *The Wizard of Oz*, *Jumanji*, *Slappy and the Stinkers*, *Wild Animal ER* and *Neighbours*. The complainants objected to the use of the word “*bitch*”, and that the word “*fucking*” was not sufficiently bleeped.

Ofcom asked Five for its comments against the following Rules:

Rule 1.3 - children must be protected by appropriate scheduling from unsuitable material;  
Rule 1.14 - the most offensive language must not be broadcast before the watershed; and  
Rule 1.16 - offensive language must not be broadcast before the watershed unless justified by the context.

#### Response

Five explained the promotion was classified internally as “schedule with care” due to the bleeped language, and while this would not prohibit broadcast before the watershed, it should not have been scheduled around programmes likely to appeal to children. When Five’s Customer Services department alerted the compliance team to complaints received on 2 March 2009, an apology was issued to the complainants and the promotion was recalled, re-edited to tighten up the edit in question, and rescheduled appropriately.

Five stated that the word “*fucking*” was inaudible having been bleeped, and also visually disguised by the subject’s mouth being blurred to avoid lip reading. It said the word “*bitch*” was broadcast because it was not deemed to be unduly offensive language in this context. Five cited Ofcom research<sup>1</sup> which suggested this language is “most likely to be seen as a playground or common word by younger groups”. Five did not accept that the majority of viewers would have been offended by the strength of language in the context of these trailers, but added that all personnel involved in scheduling promotions had been made aware of the matter.

#### Decision

Ofcom notes that, the broadcaster did not intend to transmit this trailer around programmes likely to appeal to children. We also took into account the broadcaster’s swift action in re-

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<sup>1</sup> Language and Sexual Imagery in Broadcasting: A Contextual Investigation, September 2005

editing this promotion, and rescheduling this trailer outside programmes likely to appeal to children.

However, particular care should always be taken when transmitting material in or around programmes which children are likely to watch. Ofcom's research has shown that "fuck" and its derivatives are regarded by many viewers as the most offensive language. In Ofcom's view, the clip of the partially bleeped "*f---ing*" appeared to have been selected to show the use of strong language by a contestant in the programme. Further it noted that, while it had been edited, the expletive was insufficiently masked to prevent the word being identifiable. It was therefore clearly unsuitable for children and was inappropriately scheduled on a mainstream free-to-air broadcaster between 16:00 and 19:00. Rules 1.3 and 1.14 were therefore breached.

As regards Rule 1.16, while the Ofcom research (as cited by Five) did indicate the word "bitch" is "most likely to be seen as a playground or common word by younger groups", this research also indicates that, for African-Caribbean and British Asian parents, "bitch" is quite a strong/offensive word in its own right. In Ofcom's opinion, the coupling of the word "*f---ing*" with the word "bitch" increased its intensity and undermined any argument that its use was justified by the context. When considering the suitability of the content of a trailer, Ofcom has to take into account that viewers come across trailers without warning and therefore the potential for offence is greater than for programmes which are signposted and scheduled in advance. Broadcasters must ensure that the content of trailers is suitable for the time of transmission, taking into account such factors as the target audience, and that it complies fully with the Code. Therefore Rule 1.16 was also contravened.

### **Breach of Rules 1.3, 1.14 and 1.16**

## Not in Breach

### The Sex Education Show

*Channel 4, 9 September 2008 to 14 October 2008, 20:00*

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#### Introduction

This series of six magazine-style programmes was broadcast by Channel 4 between 9 September 2008 and 14 October 2008 in a timeslot before the 21:00 watershed. As the title made clear, the series set out to provide educational information about sex to a wide range of viewers and was primarily aimed at young people.

The programmes covered a wide range of topics including pornography, sexual behaviour, sexually transmitted infections, erectile dysfunction, fertility, contraception, pregnancy, parenting and abortion. The programmes, presented by the journalist Anna Richardson, were fast-paced and at times light-hearted. They contained short films, studio discussions and interviews with the general public, health professionals and experts about sex and sexual behaviour.

Ofcom received a total of 152 complaints about the series. The majority of these complaints questioned whether it was appropriate to schedule the programme at 20:00, before the 21:00 watershed, when younger viewers may have been watching. In addition, viewers raised specific objections to some of the content featured throughout the series. In particular, concerns were expressed about the following:

- close-ups of male and female genitalia in several programmes;
- close-up of the symptoms of sexually transmitted infections ("STIs");
- frank and open discussions about sex; and
- a sequence in which teenagers were shown images of penises and breasts.

In light of these concerns about the scheduling of the series, we asked Channel 4 to comment on the scheduling rules contained in the Code. These are:

- Rule 1.3 – children must be protected by appropriate scheduling from material that is unsuitable for them;
- Rule 1.4 – broadcasters must observe the watershed; and
- Rule 1.17 – representations of sexual intercourse must not occur before the watershed, or when children are particularly likely to be listening, unless there is a serious educational purpose.

#### Response

##### *General*

Channel 4 first of all outlined the background to the series. It said that the programme made clear that the explosion in sexually transmitted infections and underage pregnancies in Britain illustrates that there is still a lack of clear straightforward information about sex. It was against this background that the programme makers set about creating a six-part television series, the purpose of which was to provide educational material about sex to all ages in an informative, accessible and innovative way.

The broadcaster said the tone of the series was entirely educational, and took the viewer through a series of components including product/service testing interviews and case

studies. Towards the end of each programme, a short medical film was screened, the purpose of which was to provide straightforward biological information in a clinical context. By utilising the various components, the programme makers sought to provide essential factual information and to draw attention to areas of possible or potential concern for parents and children.

#### *Appropriate scheduling and the watershed*

Channel 4 said that many of the complaints assumed that it is never possible for nudity or a discussion of sexual matters to occur prior to the watershed when in fact under the Code there is no absolute prohibition.

Channel 4 said that in order to decide whether a particular programme is scheduled appropriately several factors should be taken into account. These include: the title of the programme, which made clear in this case that the content would be informative and educational about sex and sexual matters; the fact that each episode of the programme was clearly sign-posted by pre-transmission announcements; and the fact that, although some of the content may have been challenging for some viewers, it was carefully contextualised. Channel 4 continued by saying that the content of the series was clearly relevant to the educational themes, and great care was taken to ensure it was neither gratuitous, sensationalist or exploitative. In addition viewers were specifically advised in advance that various segments of the programme would contain full frontal nudity, for example in the context of sexual health screenings or during a discussion on genital conditions. As a result the broadcaster did not accept that any of the programme's material was unsuitable for children so as to breach Rule 1.3.

Similarly, in relation to Rule 1.4 and observance of the watershed, Channel 4 reiterated its view that the series was appropriately scheduled and the intention of the series was to provoke discussion, learning and interest amongst children and adults. Channel 4 continued by saying that, even if the view was taken that some of the material in the programme may have been unsuitable for children, the context of the broadcast ensured that there was no breach of the watershed. It said that no one who watched one of the programmes in its entirety could have been caught out by the nature of the material: the title of the programme and the advice given to viewers prior to its commencement and the start of each part of the programme would have made the nature of the broadcast clear. In addition, Channel 4 argued that the series was entirely educational in content and tone and did not engage in unnecessary or gratuitous use of images or words.

In relation to Rule 1.17, Channel 4 argued that the series contained no representations of sexual intercourse and that, while throughout the series there were discussions of sexual behaviour, all of these were editorially justified and appropriately limited. It referred to a sequence in the first episode of the series during which the presenter was seen participating in a tantric sex lesson (this particular sequence attracted a large number of complaints to Ofcom). It said this was the closest the series came to a "representation of sexual intercourse" but that the programme made clear that no one was actually having sex. It argued that the discussion and illustration of tantric sex was editorially justified and appropriately limited. It added that this segment had a serious educational purpose: it was part of the presenter's exploration of the expensive and well advertised techniques and sexual aids the public – particularly young people – are constantly urged to spend their money on.

Addressing the specific areas raised by Ofcom about the content of the series (for example the close-ups of male and female genitalia and images of STIs), Channel 4 explained that it did not believe any of the material was in breach of the Code. For example, it said that all of the occasions of genitalia being shown were informative and educational – and completely

appropriate for children. The audience was warned that the sequences using naked models would involve nudity and these were carried out in a clinical way, completely devoid of titillation or exploitation.

Channel 4 also dealt with a concern of complainants about episode one of the series. This featured a discussion about an explicit pornographic video clip found on the internet. The presenter interviewed teenagers who had previously, and independently, viewed the clip, and then played the clip to a group of the teenagers' parents. Channel 4 emphasised the following: no part of the relevant internet clip was actually shown in the programme; the programme clearly condemned the easy access teenagers have to material such as the internet clip; and the parents who were shown the internet clip knew that they were about to see a shocking pornographic clip and agreed to be filmed watching it.

The channel argued that the discussion of this clip was entirely appropriate and there was real educational value in this segment – particularly as the programme gave practical information about how access to internet material such as this can be limited by responsible parents.

The broadcaster continued by re-emphasising that *The Sex Education Show* was justified editorially, appropriately contextualised, and was not gratuitously graphic, lurid or titillating. Channel 4 also pointed out that many of the complainants focused on specific images or topics which complainants considered younger people should simply not view. For example, complainants objected to the image of a foreskin of a penis being pulled back to demonstrate proper washing techniques. Channel 4 argued however that these complainants failed to take into account the contextual framework of the series.

## Decision

In ensuring that broadcasters apply generally accepted standards, Ofcom must do so in "the manner that best guarantees an appropriate level of freedom of expression"<sup>1</sup>. Freedom of expression not only encompasses the right to hold opinions but also to receive and impart information and ideas without interference by public authority. Applied to broadcasting, Article 10 therefore protects the broadcaster's right to transmit material as well as the audience's right to receive it, as long as the broadcaster ensures compliance with the Rules of the Code as well as the law.

Therefore Ofcom considers it of paramount importance that broadcasters, such as Channel 4, can explore controversial subject matter provided they comply with the Code. In particular, Ofcom recognises Channel 4's statutory remit to provide "...a broad range of high quality and diverse programming which, in particular ....exhibits a distinctive character."<sup>2</sup>

It is inevitable that such programmes will have a high profile and may lead to a large number of complaints. The overriding issue that had to be considered in relation to this series was the question of whether or not it was appropriately scheduled so as to ensure that people under eighteen were given suitable protection under Rules 1.3, 1.4 and 1.17 of the Code. Many complainants objected to the content and tone of the series generally and felt that a series of this nature should not in principle be broadcast before the watershed. In addition there were objections to specific items or sequences being shown before the watershed, for example complainants objected to close-ups of male and female genitalia and discussions of a sexual nature. Ofcom accepts that some viewers found some of the content challenging in a pre-watershed timeslot. However it considers that it would be an inappropriate and a disproportionate limitation on the freedom of speech and editorial freedom of the broadcaster

<sup>1</sup> Section 4(g) of the Communications Act 2003

<sup>2</sup> Section 265 of the Communications Act 2003

to prohibit programmes of this nature before the watershed. A series like this must always be considered as a whole, and any potentially offensive material within it assessed in context.

In deciding whether this series was appropriately scheduled, Ofcom took account of a number of factors, including the nature of the content, the nature of the series and the likely expectations of the audience. We considered that the series title clearly indicated to viewers the likely content of the programmes. Viewers were further alerted to the tone of the programmes by pre-transmission warnings which described the series as "revealing" and "frank". The context of the programme was clearly explained to viewers at the outset - before the first programme there was the following announcement:

*"...the birds and the bees...time for some sex education, whether you are eight or eighty. Anna Richardson tackles everything you've wanted to know about sex but were afraid to ask in a frank and revealing new series..."*

The presenter then opened the first programme by telling viewers:

*"Sex, Sex, Sex. I'm about to get the Great British public talking about sex...and why? Because we need to...when it comes to sex, Britain is in meltdown and those most at risk are our children...welcome to the Sex Education Show."*

Ofcom also noted that in addition, there were separate advisory warnings to viewers included within the programmes, immediately before all items which contained nudity. For example, in the fourth episode of the series, before a film dealing with a male sexual health screening was shown, viewers were told:

*"...it's time to get rid of the fear and ignorance. Here's a video showing you exactly what happens when a man has a sexual health check-up, which means there will be some nudity in this film."*

While the nature of the images and discussions were frank, the series' overall focus was clearly on the educational aspects of sex and could not reasonably be described as salacious or gratuitous. Ofcom therefore bore in mind that the series was attempting to examine sex and sexual health issues in an accessible way that would engage viewers.

Ofcom accepts that this series had a serious educational purpose as regards both adults and those under eighteen, and understands that in order to fulfil such a purpose, it may be appropriate to broadcast a series like this in a timeslot likely to attract a significant young audience. Nevertheless, as was pointed out by some complainants, many viewers have an expectation that programmes dealing with sex education are likely to be broadcast to younger viewers in a moderated environment - for example at school - not on a weekday evening, on a free-to-air channel at 20:00. Ofcom noted the audience figures for the follow-up series to this one - *The Sex Education Show v Pornography* - which consisted of similar material but was broadcast at 21:00, after the watershed. This follow-up series attracted a very similar number of younger viewers to *The Sex Education Show*. Nevertheless, in this respect Ofcom considers that *The Sex Education Show* may have just as effectively achieved its educational aims, as described by Channel 4, if it had been broadcast after the watershed, and without some of the difficulties the series has experienced, as evidenced by the level of complaints received by Ofcom.

Channel 4 should also be aware that the nature of some of the images in the series was at the limits of what is considered to be acceptable under the Code for this time. In addition some of the sequences dealt with subject matter which would more properly be positioned in a post-watershed timeslot, for example the item on tantric sex in the first episode. This was because during this item, Ofcom considered that the programme's emphasis shifted from

educating and informing viewers about sexual health to suggesting methods of improving sexual technique and arousal. While, this could not reasonably be described as explicit, it nevertheless did address more adult themes, perhaps more appropriate to a post-watershed audience. For these reasons, this material came extremely close to breaching the Code.

The clip which attracted the largest number of complaints occurred during the first episode and dealt with the internet viewing habits of teenagers, and one pornographic clip in particular. Ofcom noted that the actual clip was not shown, and that the focus of the segment was to highlight the dangers of young people viewing such material. The broadcaster was not itself responsible for showing the material to the youngsters - it had emerged during the production of the programme that teenagers were viewing this type of material. The clip was shown to parents to enlighten them about the explicit nature of the content their children may have had access to. It revealed, importantly, that some parents were unaware and also shocked by what content their children were accessing. While the discussion was frank, it was not in Ofcom's opinion gratuitously explicit and did not in any way condone or glamorise the accessing of internet pornography by teenagers. Further, it provided information to parents about how they could limit their teenagers' access to the internet to prevent them viewing such content. Ofcom therefore found that this sequence, in the context of an educational programme such as this, did not breach the Code.

In conclusion, having weighed up all the considerations in this difficult area Ofcom found that, on balance, the scheduling of the series was not in breach of the Code. Mindful of the series as a whole, Ofcom was satisfied that the educational purpose of the series, and the broadcaster's and viewers' right to freedom of expression, outweighed the concerns of complainants about the protection of children from sexual material.

We wish to stress, however, that the scheduling of the series was at the edge of acceptability under the Code. Without the very strong context provided by the well understood style and approach of the broadcaster, or the seriousness and care with which the material was presented, it is doubtful that the scheduling of the series would have been judged as compliant with the Code.

### **Not in breach**

## Fairness and Privacy cases

### Not Upheld

#### Complaint by Maria Mercedes Brown

*The Trisha Goddard Show, Five, 8 October 2008*

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**Summary:** Ofcom has not upheld this complaint of unfair treatment made by Ms Maria Mercedes Brown.

On 8 October 2008, Five broadcast an episode of *The Trisha Goddard Show*. Ms Maria Mercedes Brown participated in one of the items covered in the programme. This item focused on the relationship between the complainant and her son, Michael. Footage of Ms Brown and her son backstage was included in the programme and both Ms Brown and her son were interviewed by Ms Goddard on stage, in front of the studio audience.

Ms Brown complained to Ofcom that she was treated unfairly in the programme as broadcast, in that she had not given informed consent to appear in it.

In summary Ofcom found that this edition of *The Trisha Goddard Show* followed the well-established nature and format of previous editions. Ofcom was satisfied that Ms Brown had not been misled about the nature and purpose of the programme, of which she appeared to have been aware before the programme was recorded. Ofcom considered that Ms Brown gave her consent to participate before her contribution was filmed and that she actively participated during filming. In the circumstances, Ofcom considered that Ms Brown had given her informed consent to participate in the programme. It therefore found no unfairness to Ms Brown.

#### Introduction

On 8 October 2008, Five broadcast an episode of *The Trisha Goddard Show*, a chat show programme hosted by Trisha Goddard. Ms Maria Mercedes Brown and her son, Michael, participated in one of the items covered in the programme, which was recorded on 18 June 2008.

In the programme, the item was introduced by Ms Goddard, who stated:

*"Now, Maria feels she's suffered relationship problems in the past because she keeps finding herself stuck in the middle of two men, a situation made more complicated by the fact that one of these men is her son, Michael. Now, Maria wants her 20-year-old son to make the most of his life, but says he only seems to get himself under her feet. Please welcome Maria."*

Footage of Ms Brown and her son backstage was included in the programme and both Ms Brown and her son were interviewed by Ms Goddard on stage, in front of the studio audience. At the end of the item, Ms Brown and her son were shown leaving the stage through the same exit. The programme credits and music followed the item, accompanied by some footage of Ms Brown and her son having a discussion backstage, interspersed with footage of Ms Goddard and the studio audience.

Ms Brown complained that she was treated unfairly in the programme as broadcast.

#### The Complaint

### **Ms Brown's case**

In summary, Ms Brown complained that she was treated unfairly in the programme as broadcast in that:

- a) She did not give informed consent to participate in the programme in that:
  - (i) She was misled about the nature and purpose of the programme, which was stated to be "to enable contributors to find a way through their problems with the help of the programme's presenter and team of counsellors".

By way of background, Ms Brown said that the programme resulted in her son, Michael, stating that he never wanted to see her again and that, as far as he was concerned, he had no mother.

- (ii) She was not given time to read, take advice on or ask any questions about the consent form before signing it. Her contractual rights and obligations and those of the programme makers and broadcaster in relation to her contribution were not explained to her.

By way of background, Ms Brown said that she was approached by a member of the production team ten minutes before the show, who stated that there was not a lot of time and that because the form was in small print and quite long she would explain the main points to Ms Brown. The explanation was to the effect that Ms Brown was not allowed to contribute to another programme such as *The Trisha Goddard Show* for at least six months, that the terms and conditions were all standard and that all contributors signed the consent form.

- (iii) Although she signed a consent form, she withdrew her consent within 24 hours of the recording of the programme and prior to broadcast of the programme.

### **Five's case**

In summary, Five responded to Ms Brown's complaint as follows:

- a)(i) Five said that Ms Brown had not been told before the programme was recorded that its purpose was "to enable contributors to find a way through their problems with the help of the programme's presenter and team of counsellors." It said that this phrase originated from a letter it had sent to Ms Brown's solicitors almost a month after the programme was recorded and that Ms Brown had not been informed this was the purpose of the programme prior to it being recorded.

Five said that, although the aim of the programme was to assist contributors with their problems, this depended on the willingness of the contributors to accept the suggestions made and at times it was not possible to assist contributors. Five said that Ms Brown would have been aware of this, having watched the programme before.

Five said that Ms Brown had appeared on the programme to discuss her problems with her son, which she did. She had acted on her own initiative and contacted the programme after seeing a trial for a future programme because she wanted Ms Goddard's help with Michael. Five explained that when viewers contacted the programme, they did so because they wanted to appear on the programme in the future.

Five said that Ms Brown had been fully aware of how her son felt about her before she took part in the programme and that their relationship had been acrimonious for a number of years. Five stated that Ms Brown had told one of the programme's researchers that she wanted Ms Goddard's help to get her son to change and make something of his life. Michael, however, had told the researcher that he wanted Ms Brown to stop interfering in his life. It was clear to the researcher from what he was told by Ms Brown and Michael that they had had a number of serious arguments in the past and that, before they came on the programme, they had not spoken for six months.

Five stated that, before being booked, potential contributors to *The Trisha Goddard Show* were always asked by the production team whether they had seen the programme before, so as to ascertain the level of detail that the producer needed to go into when describing the programme, its nature and its purpose to that contributor. In Ms Brown's case, she had contacted the programme herself and informed the researcher she had seen the programme before. Five said that the researcher was confident that Ms Brown knew about the nature of the programme and the potential effects of her appearing on it with her son. Ms Brown had also confirmed again to the same researcher at the studio that she had seen the programme before. Five said that, although Ms Goddard and her team would try and might have been able to help Ms Brown and Michael with their problems, this was not guaranteed and Ms Brown had been fully aware of this.

Five said that, during their appearance on the programme, Ms Brown and Michael had discussed their issues with Ms Goddard. Both had been given the opportunity to put their views across and to respond to points made by the other, and Ms Goddard made some suggestions to help matters going forward. Ms Goddard suggested that Michael talked to the programme's counsellors to find out what was available in his area to help him "skill up" and that he stop letting Ms Brown be so involved in his life by showing her that he was capable of controlling his own life. Ms Goddard also suggested to Ms Brown that she accept that some of her actions in the past had hurt Michael, which Ms Brown had agreed to. Ms Brown and Michael then left the stage together.

Five stated that, after the programme had been recorded, two meetings had taken place between Ms Brown and Michael, the first attended by a researcher and the second attended by the assistant producer. During these meetings, Michael's attitude changed: he became very angry and acted aggressively towards Ms Brown. The researcher and assistant producer had both been shocked by Michael's change in attitude, as he had expressed himself more calmly on stage.

In light of the above, Five said that Ms Brown had not been misled as to the nature of the programme. Five said that, furthermore, by signing the consent form, Ms Brown had confirmed that she was aware of the nature and purpose of the programme, what the programme was about, why she had been asked to contribute, what contribution she was expected to make, that she would be interviewed by Ms Goddard and might be questioned by other contributors and the audience, the potential areas of questioning and the nature of other likely contributions.

- (ii) Five said that Ms Brown had been given time to read, take advice on, or ask any questions about the consent form before signing it. It said that, on the day of filming, Ms Brown had arrived at the studio approximately three and a half hours before her contribution was recorded. The assistant producer had visited her within an hour of her arrival and had gone through the consent form with her. The assistant producer said that she "would never leave it" until 10 minutes before filming started to go through a consent form with a contributor. Five said that the nature of the studio schedule meant that it would have been wholly impractical to ask a contributor to sign a release form 10

minutes prior to record because, by this time, the contributor would have been fitted with a microphone and would be backstage or standing in a corridor with a studio floor manager. Five said that the consent form was dealt with shortly after contributors arrived so that they had an opportunity to seek further advice before signing it and did not hold up the recording of the programme.

Although the assistant producer of the programme and the researcher who liaised with Ms Brown did not now recall precisely what the assistant producer had said when she had gone through the consent form with Ms Brown, her usual practice was to:

- Always ensure that there was sufficient time to go through the consent form in detail with the contributor;
- Always allow the contributor time to ask any questions about the form;
- Always allow the contributor to read the consent form themselves if they wished to do so;
- Explain the form to contributors in detail using the consent form itself as a point of reference (because her experience was that contributors were not especially interested in reading the form in detail). She would go through the consent form with the contributor focusing on the following key points:
  - o they were taking part in a television programme;
  - o they were being filmed and their appearance would be shown on television;
  - o for six months they could not appear on any other television programme;
  - o the production company might edit the programme for time but not for content (i.e. their contribution would not be edited in a way that would be unfair to them); and
  - o once filmed, the production company owned the rights in the programme and it might be repeated and shown in other countries.
- Ensure that a contributor was provided with a copy of the consent form on the same day, if a contributor asked for one. However, it was not standard practice for contributors to be provided with a copy of the consent form.

Five said that the assistant producer would always offer to explain the content of the form and, if the contributor did not require any explanation, would always ensure she had covered the points set out above with the contributor. The assistant producer stated that she would not have told a contributor that the consent form was "in small print" or "standard". Five said that the assistant producer had not limited her explanation to the point about Ms Brown not being able to appear on another programme for six months.

Five believed that the content of and consequences of signing the consent form had been properly explained to Ms Brown and that she had been given sufficient time to read the consent form, ask questions and seek further advice if necessary, which she declined to do.

- (iii) Five said that, the day after filming, a member of the production team had telephoned Ms Brown. Ms Brown had asked for a copy of the consent form and subsequently sought to withdraw her consent to the programme being broadcast. Five stated that Ms Brown's request to withdraw her consent appeared to be based on her claim that the consent form had not been properly explained to her. It said that at no time had Ms Brown been led to believe that she would be able to withdraw her consent after the programme had been recorded. Five said that, whilst it was sorry to learn that Ms Brown felt that contributing to the programme had been a mistake, it was satisfied that

she had given her informed consent to appear on the programme and that there were no grounds not to transmit the programme.

## Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

Ms Brown's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of the relevant section of the programme and both parties' written submissions.

In considering Ms Brown's complaint that she did not give informed consent to participate in the programme, Ofcom took into account Rule 7.1 of the Code, which sets out that broadcasters must avoid unjust or unfair treatment of individuals in programmes. Ofcom also took into account each of the measures set out in Practice 7.3 of the Code, which provides that, where a person is invited to contribute to a programme, they should normally, at an appropriate stage:

- be told the nature and purpose of the programme, what the programme is about, and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.

Practice 7.3 of the Code goes on to set out that taking the measures listed above is likely to result in the consent that is given being 'informed consent', and that it may be fair to withhold all or some of this information where it is justified in the public interest.

- a)(i) Ofcom first considered Ms Brown's complaint that she did not give informed consent to participate in the programme in that she was misled about the nature and purpose of the programme.

It is important to note that potential contributors to a programme should be given sufficient information about its nature and purpose to enable them to make an informed decision about whether or not to take part. In assessing whether a contributor has given informed consent for their participation, Ofcom will not only look at the

information that was available to the contributor before the recording of the contribution but also consider the contribution itself.

Ofcom first considered the information that had been available to Ms Brown in advance of participating in the programme. Ofcom noted that, in its response to the complaint, Five stated that Ms Brown had not been told before the programme was recorded that its purpose was “to enable contributors to find a way through their problems with the help of the programme’s presenter and team of counsellors.” Rather, she had contacted the programme herself because she wanted Ms Goddard’s help with her son, having seen a trailer for a future programme. Ofcom also noted that *The Trisha Goddard Show* has a well-established nature and format, exploring issues such as conflict and resolution, reunion and families in crisis through discussion and debate with those participating in the programme, and that a member of the production team stated that Ms Brown had confirmed to him on at least two occasions that she had seen the programme before. Ofcom was of the view that, having watched the programme before, Ms Brown would have been aware that there was no certainty that contributors’ problems would be solved by Ms Goddard and her team. Finally, whilst Ofcom does not consider that the question of whether a participant in a programme has given informed consent rests on the signing of a consent or release form, Ofcom noted that Ms Brown had signed a form confirming that she had been told the nature and purpose of the programme. In all these circumstances, Ofcom was satisfied that there was sufficient information available to Ms Brown for her to be informed about the nature and purpose of the programme in advance of filming. In addition, there was no information to suggest that Ms Brown had been misled.

Ofcom went on to consider the programme as broadcast and whether the content of this edition of *The Trisha Goddard Show* reflected the nature and purpose of the programme as understood by Ms Brown prior to filming. Ofcom noted that Ms Brown and her son were shown in the programme discussing their issues with Ms Goddard, that both were given the opportunity to put their views across and to respond to points made to them, and that Ms Goddard made some suggestions to try to help matters going forward. Ofcom noted that the programme showed Ms Brown participating willingly in discussions with Ms Goddard and her son. In Ofcom’s view, Ms Brown was shown engaging with them in a manner which demonstrated that she understood the subject matter of the programme and the established format of *The Trisha Goddard Show*. Ofcom also noted that no significant changes were made to the programme between the recording and broadcast of the programme such as to negate the consent to participate given by Ms Brown.

In light of the above, Ofcom considered that this edition of *The Trisha Goddard Show* followed the well-established nature and format of previous editions. Ofcom was satisfied that Ms Brown was not misled about the nature and purpose of the programme, that she appeared to have been aware of its nature and purpose before filming and that she actively participated during the recording of the programme. In this regard, therefore, Ofcom considered that Ms Brown had given her informed consent to participate in the programme. It therefore found no unfairness to Ms Brown in this respect.

- (ii) Ofcom went on to consider Ms Brown’s complaint that she had not given informed consent to participate in the programme in that she was not given time to read, take advice on or ask any questions about the consent form before signing it and that her contractual rights and obligations and those of the programme makers and broadcaster in relation to her contribution were not explained to her.

Ofcom noted that there was a conflict of evidence between Ms Brown and the broadcaster as to the time at which the assistant producer of the programme had gone through the consent form with Ms Brown. Ofcom did not consider that it was able to resolve this conflict of evidence. However, whilst it was not clear at precisely what time the assistant producer had introduced the consent form to Ms Brown, both parties agreed that she had gone through the consent form with Ms Brown and that Ms Brown had signed it at some point before her contribution was recorded. Whilst Ofcom does not consider the signing of a consent form to be determinative of whether or not a participant has provided their informed consent to participate in a programme, as set out at decision head a)(i) above, Ofcom has found that Ms Brown was familiar with *The Trisha Goddard Show* before it was recorded and that no significant changes to the programme were made between the recording and broadcast of the programme such as to negate the consent to participate given by Ms Brown. In addition to this, Ofcom noted that it appeared that Ms Brown was aware that she was participating in a television programme, that her contribution would be a pre-recorded discussion/interview, that the area for discussion and questioning would be the issues between her and Michael and that her son would also be contributing to the programme.

Ofcom also noted that both Ms Brown and the programme makers agreed that Ms Brown had been informed by the assistant producer that she would not be able to appear on another television programme for six months and that Ms Brown had signed a consent and release form, which set out her contractual rights and obligations and those of the programme maker and broadcaster in relation to her contribution. Whilst Ofcom noted that Ms Brown contended that she had not been given time to read, take advice on or ask any questions about the consent form, it also noted that she could not be described as a person who was not in a position to give consent (such as a person under sixteen), and that it had been within her gift to ask for more time to consider the consent form, or to ask questions about it, but that she had not done so.

In the circumstances of this case, Ofcom found that Ms Brown had given her informed consent to participate in the programme at an appropriate stage, prior to recording of her contribution. Ofcom also found that she had been given information about the nature of her contractual rights and obligations and those of the programme maker and broadcaster in relation to her contribution. It therefore found no unfairness to Ms Brown in this respect.

- (iii) Finally, Ofcom considered Ms Brown's complaint that she had not given informed consent to participate in the programme in that, although she signed a consent form, she withdrew her consent prior to broadcast of the programme.

As set out at decision heads a)(i) and (ii) above, Ofcom considered that the programme as broadcast followed the nature and format established in previous editions of *The Trisha Goddard Show*. Ofcom was satisfied that, prior to the recording of the programme, Ms Brown appeared to have understood or to have been informed about the nature and purpose of the programme, what type of contribution she was expected to make, the areas of questioning, the nature of other likely contributions and the nature of her contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution. Ofcom considered that the programme as broadcast was in line with the information Ms Brown was given before agreeing to take part and that no significant changes had arisen between the recording of Ms Brown's contribution and the broadcast of the programme. Although, shortly after the recording of the programme Ms Brown had sought to withdraw her consent, Ofcom concluded that the programme makers had been reasonably entitled to consider that they had obtained Ms Brown's informed consent to her participation in the programme

and that, in the absence of any significant changes to the programme or her contribution, that consent remained valid.

**Accordingly Ofcom has not upheld Ms Brown's complaint of unfair treatment in the broadcast of the programme.**

## Not Upheld

### Complaint by Mr Matias Coombs

*Sky Cops, BBC1, 24 September 2008*

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**Summary:** Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mr Matias Coombs.

The BBC broadcast an edition of *Sky Cops*, an observational documentary series that followed the work of police helicopter units around the country. Footage was included of a helicopter unit assisting officers on the ground to locate four suspected deer poachers in Dagnam Park. During the programme it became apparent that two of the men were present with permission as part of an organised deer cull and the voiceover at the end of the programme said that the men were not charged with any offences.

Ofcom found as follows:

- The programme showed events unfolding as the Sky Cops attended Dagnam Park and it was made clear that Mr Coombs was not engaged in unlawful activity but was taking part in an authorised deer cull.
- The broadcast of footage of Mr Coombs engaged in a lawful activity in an area of land frequented by members of the public did not infringe his privacy.

### Introduction

On 24 September 2008 BBC1 broadcast an edition of *Sky Cops*. The series followed the work of police helicopter units around the country. This edition of the series included footage of a helicopter unit assisting officers on the ground to locate suspected deer poachers in Dagnam Park, in the London Borough of Havering. The programme included footage of the complainant Mr Matias Coombs and three other men. The men were shown being trailed by the helicopter unit, as they were initially suspected of poaching. One of the officers then stated that he had received information that two of the men had permission to be in the park, as part of an organised deer cull. The commentary then said that the officers in the helicopter and those on the ground could not "*take anything for granted*". Footage was shown of the men communicating with one of the police officers running the investigation and putting down their guns, as requested by the officer. At the end of the programme, the voiceover said:

*"The deer hunters were not charged with any offences".*

Mr Coombs complained to Ofcom that he was treated unfairly and that his privacy was unwarrantably infringed in the programme as broadcast.

### The Complaint

#### Mr Coombs' case

In summary, Mr Coombs complained that he was treated unfairly in that:

- a) He was portrayed as engaging in unlawful activity when in fact he was engaged in an authorised deer cull.

By way of background Mr Coombs said that he had explained to Sergeant Mark Lambkin, the officer investigating alleged poaching in the park, three weeks prior to the incident shown in the programme that what was taking place was legal culling on private property. Sergeant Lambkin, who appeared in the programme, therefore knew that what was taking place was a legal cull and not poaching.

In summary, Mr Coombs complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- b) He was clearly recognisable in the programme.

By way of background, Mr Coombs said that the use of the footage resulted in an increase in risk to the security of his lawfully held firearms and may have had a negative impact on his public persona as a parish councillor, school governor and prospective borough council candidate.

### The BBC's case

The BBC said that *Sky Cops* was a factual, observational documentary, which allowed the audience to follow the work of airborne police teams. The episode complained of followed officers of the Metropolitan Police's Air Support Unit as they provided assistance to other police officers investigating possible firearms offences. In the case of the incident involving Mr Coombs, police had been asked to investigate the illegal hunting of deer in Dagnam Park. Mr Coombs and a group of associates were filmed by police officers in the helicopter, who in the first instance believed that Mr Coombs' group might have been the illegal poachers they had been asked to watch for.

In summary the BBC responded to Mr Coombs' complaint of unfair treatment as follows:

- a) The BBC first responded to the complaint that Mr Coombs was unfairly portrayed as engaging in unlawful activity when in fact he was engaged in an authorised deer cull.

The BBC said that it was clear from the programme that the police officers in the helicopter believed that the men on the ground might have been those believed to have been responsible for the illegal killing of deer. Because the men were in possession of high-powered weapons, armed officers on the ground were called in support. The BBC accepted that when police first observed the group the officers suspected that they might have been involved in poaching. However, the BBC said that the programme's script made it clear that as events unfolded, the men were engaged in perfectly legitimate, legal activity. The BBC did not believe that any viewer could reasonably have formed the impression that Mr Coombs and his group were involved in anything unlawful.

In summary the BBC responded to Mr Coombs' complaint of unwarranted infringement of privacy in the broadcast programme as follows:

- b) The BBC said that at the time of filming and transmission, the programme makers believed that the land on which these events took place was public land. Mr Coombs later informed the programme makers that the land was, in fact, private land, rented from Havering Council by a local farmer. The BBC said that it was not in a position to comment on whether this was the case or not. However the BBC said that Mr Coombs had acknowledged in correspondence that the demarcation between this land and Dagnam Park, an area of undisputedly public land which abutted it, was not clear. Furthermore the BBC argued that the area that Mr Coombs said was private land was routinely used by local people as if it were public land. The BBC said that a number of

people were filmed during the making of the programme walking their dogs over this area.

The BBC said that Mr Coombs and his colleagues were openly going about their lawful business, as was made clear, on land that was effectively open to and frequented by the public. The BBC therefore argued that Mr Coombs did not have any significant expectation of privacy and his privacy was not infringed in the broadcast of this programme.

The BBC said that if, however, Ofcom took the view that there had been an infringement of Mr Coombs' privacy, it believed it was slight in the circumstances and warranted by the public interest in the subject matter of the programme, which was a broad look at this police unit's role in dealing with gun crime and firearms offences.

## **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

Mr Coombs' complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions from each party.

- a) Ofcom first considered the complaint that Mr Coombs was unfairly portrayed as engaging in unlawful activity, when he was in fact engaged in an authorised deer cull.

In considering this part of the complaint Ofcom took account of Practice 7.9 of the Ofcom Broadcasting Code ("the Code"). Practice 7.9 states that broadcasters must take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom first noted what was said in the programme about the deer hunters. Ofcom noted that the unfolding story of the police operation in Dagnam Park was intercut with several other police helicopter operations. The programme first explained there had been reports of deer poaching in Dagnam Park. When the programme returned to the poaching story, the commentary stated:

Commentary:        "*The deer hunters are back*".

The voiceover and the police officers themselves then referred to the possible danger they were in as the "*hunters*" were armed. Footage of Mr Coombs was first shown as the voiceover said "*And more hunters are appearing*". This was followed by a brief close up shot of Mr Coombs. The programme then showed the officers in the helicopter watch the events unfolding. Later in this section of the programme, one of the officers said:

Officer in helicopter: "*The two males on foot have permission to be there*".

This was immediately followed by a commentary line which said:

Commentary:     *"The two with permission are part of an organised deer cull. But the Sky Cops and the Trojan officers<sup>11</sup> can't take anything for granted. These are powerful and lethal weapons and must be made safe".*

The men were asked to put their guns down by one of the officers in the helicopter while they waited for assisting officers to arrive on foot. It was clear from the footage that the men complied with the request. Shortly afterwards, one of the police officers said in interview that:

Police officer:     *"Two of the people on the ground out of the four were in direct contact via mobile phone with one of the sergeants who was running the job. So he was basically relaying to them where to put the guns, to actually stand away from them".*

The same officer said shortly afterwards that the *Sky Cops* had confirmed to the officers on the ground that:

Police officer:     *"...all the people had complied and that it was relatively safe to approach. You never write it off as low risk, it's always going to be high or unknown because you just don't know what's going to happen".*

At the conclusion of this segment of the film, there was a line of commentary which said:

Commentary:     *"The deer hunters were not charged with any offence".*

Ofcom noted that the section of the programme in which this story was included began by bluntly indicating that the officers were looking at deer poachers and making a clear statement that the "*The deer hunters are back*". In Ofcom's view the viewer was therefore initially led to believe that the group of men being filmed were the poachers referred to earlier in the programme.

Ofcom also noted that Mr Coombs was not named in the programme and that, apart from one brief close up shot of him, all the footage of Mr Coombs included in the programme was taken from a long distance or only showed him from behind.

Ofcom went on to consider the context of the full programme. *Sky Cops* sets out to demonstrate how helicopter units assist police on the ground and shows them as they go about their work. The programme shows events as they unfold and it is clear that some incidents in which the officers assist turn out not to involve any criminal activity. As well as the Dagnam Park footage, this edition included a story in which a helicopter unit followed a suspected armed burglar who, it emerged, was neither armed nor dangerous. Taking the story as a whole and in light of the context of the programme, Ofcom took the view that the programme demonstrated the role played by the helicopter unit and, although it was suggested at first that Mr Coombs and the other men were poachers, this was an accurate reflection of the basis on which the *Sky Cops* first approached the men in the Park and was in keeping with the narrative style of the programme. The programme then quickly made clear that the men were engaged in a lawful activity, namely an organised deer cull. Ofcom noted that the programme concluded by clarifying that the men were not charged with any offences. In these circumstances, Ofcom

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<sup>11</sup> The officers on the ground.

considered that viewers would have understood that Mr Coombs was not acting unlawfully.

Ofcom therefore found no unfairness to Mr Coombs in this respect.

- b) Ofcom next considered Mr Coombs' complaint that his privacy was unwarrantably infringed in the programme as broadcast in that he was clearly recognisable from the footage used in the programme.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted? (Rule 8.1 of the Code).

In considering whether Mr Coombs' privacy was infringed in the broadcast of the programme, Ofcom first considered whether he had a legitimate expectation of privacy in the circumstances in which footage of him was broadcast.

As set out under decision head a) above, Ofcom noted that Mr Coombs was not referred to by name in the programme and that, with the exception of one brief close up shot of him, the footage of him in the programme was taken from a long distance or only showed him from behind. Ofcom acknowledged that Mr Coombs was likely to be recognisable to a significant number of people from the programme. However Ofcom also noted that footage of Mr Coombs that was broadcast showed him going about his lawful business in a place to which the public had access. In Ofcom's view, participating in an authorised deer cull is not an activity of a private nature. Ofcom acknowledged that Mr Coombs stated that the land on which the footage was filmed was privately owned, however, it also noted that both parties accepted that the area is routinely treated by local people as a public place. In these circumstances, Ofcom did not consider that Mr Coombs had a legitimate expectation of privacy in relation to the broadcast of footage which showed him engaged in a lawful activity that was not private, in an area that was frequented by members of the public.

Having found that Mr Coombs did not have a legitimate expectation of privacy, Ofcom found that his privacy was not infringed in the programme as broadcast. It was not therefore necessary for Ofcom to further consider whether any infringement of privacy was warranted.

**Accordingly Ofcom has not upheld Mr Coombs' complaint of unfair treatment and unwarranted infringement of privacy in the broadcast of the programme.**

## Other Programmes Not in Breach/Resolved

Up to 5 May 2009

Programme	Transmission Date	Channel	Category	Number of complaints
5 Live Breakfast	27/03/2009	BBC Radio 5 Live	Religious Offence	1
A Convenient Fiction	13/04/2009	Info TV 2	Inaccuracy/Misleading	1
Adrian Goldberg	21/04/2009	Talksport	Generally Accepted Standards	1
Airplane!	17/03/2009	Film 4	Advertising	1
Alfie Joey	02/04/2009	BBC Radio Newcastle	Generally Accepted Standards	1
All Star Mr & Mrs	21/04/2009	ITV2	Generally Accepted Standards	1
America's Next Top Model	17/04/2009	Living +1	Generally Accepted Standards	1
Ant & Dec's Saturday Night Takeaway	21/03/2009	ITV1	Sex/Nudity	3
Ashes to Ashes	20/04/2009	BBC1	Generally Accepted Standards	1
Ashes to Ashes (trailer)	19/04/2009	BBC1	Violence	3
Bath FM	07/04/2009	Bath FM	Commercial References	1
Borat (trailer)	07/04/2009	Channel 4+1	Sex/Nudity	1
Bowtime	16/04/2009	Talksport	Animal Welfare	1
Breakfast with Jules and Bunker	02/04/2009	Ocean FM	Crime (incite/encourage)	1
Britain's Got More Talent	18/04/2009	ITV2	Dangerous Behaviour	1
Britain's Got Talent	18/04/2009	ITV1	Sex/Nudity	1
Britain's Got Talent	11/04/2009	ITV1	Sex/Nudity	1
Business News	22/01/2009	Channel SNTV	Sponsorship	1
Calendar News	30/03/2009	ITV1 (Yorkshire)	Generally Accepted Standards	1
Channel 4 News	16/04/2009	Channel 4	Due Impartiality/Bias	2
Chris Moyles Show	08/04/2009	BBC Radio 1	Offensive Language	4
Chris Moyles Show	24/03/2009	BBC Radio 1	Generally Accepted Standards	1
Chris Moyles Show	08/04/2009	BBC Radio 1	Generally Accepted Standards	1
Chris Moyles Show	25/03/2009	BBC Radio 1	Generally Accepted Standards	1
Click	12/04/2009	BBC News Channel	Offensive Language	1
Competition	10/04/2009	Real Radio	Use of Premium Rate Numbers	1
Coronation Street	12/04/2009	ITV1	Religious Offence	59
Coronation Street	24/04/2009	ITV1	Sex/Nudity	1
DEC Campaign for Gaza	26/01/2009	ITV1	Due Impartiality/Bias	3
Domino's sponsorship of America's Got Talent	31/03/2009	ITV2	Harm/Food	1
Drinking with the Girls	21/04/2009	BBC3	Generally Accepted Standards	1
Eastenders	02/04/2009	BBC1	Generally Accepted Standards	52
Eastenders	21/04/2009	BBC1	Generally Accepted Standards	1
Embarrassing Bodies	15/04/2009	Channel 4	Sex/Nudity	13
Emmerdale	21/04/2009	ITV1	Substance Abuse	1
Emmerdale	21/04/2009	ITV1	Substance Abuse	1
Emmerdale	16/04/2009	ITV1	Inaccuracy/Misleading	1
Emmerdale	21/04/2009	ITV1	Substance Abuse	1
Extraordinary People: Freak Show Family	06/04/2009	Five	Generally Accepted Standards	1
Extreme Fishing with Robson Green	18/04/2009	Five	Offensive Language	1
Extreme Fishing with Robson Green	13/04/2009	Five	Animal Welfare	1

Fifth Gear	15/04/2009	Dave	Generally Accepted Standards	1
Friday Night With Jonathan Ross	17/04/2009	BBC1	Generally Accepted Standards	8
Front Row	17/04/2009	BBC Radio 4	Offensive Language	1
GMTV	21/04/2009	ITV1	Generally Accepted Standards	3
GMTV	14/04/2009	ITV1	Sex/Nudity	1
GMTV	23/04/2009	ITV1	Religious Offence	1
Gok's Fashion Fix	14/04/2009	Channel 4	Generally Accepted Standards	1
Gok's Fashion Fix competition	03/10/2008	Heart 106.2 FM	Competitions	1
Grey's Anatomy	15/04/2009	Living	Violence	1
Harry Hill's Shark Infested Custard	04/04/2009	CITV	Generally Accepted Standards	1
Hell's Kitchen	25/04/2009	ITV1	Generally Accepted Standards	1
Hell's Kitchen - The Finale	27/04/2009	ITV1	Other	1
Hell's Kitchen	22/04/2009	ITV1	Other	1
Hell's Kitchen	17/04/2009	ITV1	Animal Welfare	10
Hell's Kitchen	16/04/2009	ITV1	Dangerous Behaviour	1
Hell's Kitchen	26/04/2009	ITV1	Generally Accepted Standards	1
Hell's Kitchen	16/04/2009	ITV1	Generally Accepted Standards	1
Heston's Roman Feast	24/03/2009	Channel 4	Animal Welfare	1
Hillsborough	15/04/2009	ITV3	Generally Accepted Standards	1
Holby City	14/04/2009	BBC1	Animal Welfare	1
Hollyoaks	14/04/2009	Channel 4	Religious Offence	3
Hollyoaks	08/04/2009	Channel 4	Generally Accepted Standards	3
Hollyoaks	12/04/2009	Channel 4	Generally Accepted Standards	1
Hollyoaks	07/04/2009	E4	Generally Accepted Standards	1
Horne & Corden	14/04/2009	BBC3	Religious Offence	1
Horrible Histories	23/04/2009	BBC1	Generally Accepted Standards	1
James Cusack	13/04/2009	Galaxy North East	Generally Accepted Standards	1
Jeremy Vine	30/03/2009	BBC Radio 2	Generally Accepted Standards	1
Katie & Peter: Stateside	16/04/2009	ITV2	Generally Accepted Standards	1
Ken Bruce	28/04/2009	BBC Radio 2	Generally Accepted Standards	1
Knights of the Night	04/03/2009	AIT Movistar	Generally Accepted Standards	1
Knorr Ragu sponsorship of Home & Away	n/a	Five	Inaccuracy/Misleading	1
Let's Dance for Comic Relief	28/02/2009	BBC1	Flashing images	1
Lewis	12/04/2009	ITV1	Offensive Language	9
Lewis	05/04/2009	ITV1	Religious Offence	1
Live International Football	01/04/2009	ITV1	Flashing images	1
Live at the Apollo	18/04/2009	BBC1	Generally Accepted Standards	2
Living with the Dead (trailer)	27/03/2009	Living	Exorcism/Occult/Paranormal	1
Loose Women	17/04/2009	ITV1	Generally Accepted Standards	1
Loose Women	16/04/2009	ITV1	Generally Accepted Standards	1
Mike Galvin	05/04/2009	Talksport	Generally Accepted Standards	1
Mike Parr at Breakfast	02/04/2009	BBC Radio Newcastle	Substance Abuse	1
Montel Williams	02/04/2009	ITV2	Inaccuracy/Misleading	1
My Family	19/04/2009	BBC1	Generally Accepted Standards	3
New You've Been Framed!	11/04/2009	ITV1	Animal Welfare	1
News	29/03/2009	LBC 97.3FM	Commercial References	1

Nick Ferrari	09/04/2009	LBC 97.3 FM	Commercial References	1
Nightwatch with Steve Scott: Crime	16/04/2009	ITV1	Generally Accepted Standards	1
No Signal	02/04/2009	FX	Generally Accepted Standards	1
Nothing to Declare	14/04/2009	Living	Offensive Language	1
One Tree Hill	18/04/2009	Channel 4	Sex/Nudity	1
Panorama: May Contain Nuts	20/04/2009	BBC1	Generally Accepted Standards	1
Paul O'Grady	26/04/2009	BBC Radio 2	Competitions	1
Paul Raymond TV	21/03/2009	Paul Raymond TV	Inaccuracy/Misleading	1
Pets Undercover: Tonight	16/03/2009	ITV1	Inaccuracy/Misleading	1
Piers Morgan's Life Stories	29/03/2009	ITV1	Generally Accepted Standards	1
Primeval	04/04/2009	ITV1	Commercial References	1
Quiz Call	19/04/2009	Five	Use of Premium Rate Numbers	1
Reggie Perrin	25/04/2009	BBC1	Suicide/Self Harm	3
Richard Madeley	29/04/2009	BBC Radio 2	Generally Accepted Standards	1
Rick Stein	02/04/2009	Virgin 1	Generally Accepted Standards	1
Robin Hood	28/03/2009	BBC1	Violence	1
Safety Catch	15/04/2009	BBC Radio 4	Generally Accepted Standards	1
Sky News	08/04/2009	Sky News	Generally Accepted Standards	1
Sky News	17/04/2009	Sky News	Violence	2
Sky News	23/03/2009	Sky News	Inaccuracy/Misleading	1
Sky News	22/04/2009	Sky News	Generally Accepted Standards	1
Sky News	05/04/2009	Sky News	Generally Accepted Standards	1
Sky News	25/03/2009	Sky News	Violence	1
Sky News	17/04/2009	Sky News	Inaccuracy/Misleading	1
Sky News	31/03/2009	Sky News	Inaccuracy/Misleading	1
Sky News Interactive	01/04/2009	Sky News	Offensive Language	1
Sonic the Hedgehog	19/04/2009	Pop	Offensive Language	1
Taggart (trailer)	06/04/2009	ITV3	Violence	1
Take It Or Leave It		n/a	Competitions	1
Tarot Reading	08/01/2009	Sunrise TV	Exorcism/Occult/Paranormal	1
Taste the Nation	20/04/2009	ITV1	Animal Welfare	1
Testees (trailer)	n/a	FX	Generally Accepted Standards	1
The Apprentice: You're Fired!	22/04/2009	BBC2	Generally Accepted Standards	2
The Biggest Loser	28/04/2009	ITV1	Generally Accepted Standards	1
The Bush and Troy Show	11/02/2009	GWR FM	Generally Accepted Standards	1
The Chat	08/04/2009	Lucky Star	Use of Premium Rate Numbers	1
The Christian O'Connell Breakfast Show	17/04/2009	Absolute Radio	Generally Accepted Standards	1
The Hospital	14/04/2009	Channel 4	Due Impartiality/Bias	4
The Inbetweeners	02/04/2009	E4	Animal Welfare	6
The Inbetweeners	02/04/2009	E4	Generally Accepted Standards	3
The Inbetweeners	16/04/2009	E4	Generally Accepted Standards	1
The Jeremy Kyle Show	28/04/2009	ITV2+1	Generally Accepted Standards	1
The Lost Prince (EPG description)	12/04/2009	Yesterday	Generally Accepted Standards	1
The National Lottery: 1 vs 100	18/04/2009	BBC1	Generally Accepted Standards	2
The O'Reilly Factor	15/04/2009	Fox News	Due Impartiality/Bias	1
The ONE Show	16/04/2009	BBC1	Generally Accepted Standards	1
The Omid Djalili Show	20/04/2009	BBC1	Generally Accepted Standards	1

The Paul O'Grady Show	20/04/2009	Channel 4	Sex/Nudity	1
The Simpsons	29/04/2009	Channel 4	Generally Accepted Standards	1
The Simpsons	22/04/2009	Channel 4	Violence	2
The Simpsons	21/04/2009	Channel 4	Sex/Nudity	3
This Week	02/04/2009	BBC1	Generally Accepted Standards	1
Today	28/03/2009	BBC Radio 4	Generally Accepted Standards	1
Toyota sponsorship of Law & Order: UK	23/02/2009	ITV1	Sponsorship	1
UEFA Champions League Live	14/04/2009	ITV1	Generally Accepted Standards	40
UK Rock Chart	17/04/2009	VH1	Offensive Language	1
WWE Raw	27/03/2009	Sky Sports 2	Violence	1
Willie's Chocolate Revolution	07/04/2009	Channel 4	Inaccuracy/Misleading	1
Willie's Chocolate Revolution	09/04/2009	Channel 4	Commercial References	3